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9 UNITED STATES DISTRICT COURT  
10 FOR THE EASTERN DISTRICT OF WASHINGTON

11 UNITED STATES OF AMERICA,

12 Plaintiff,

13 v.  
14

15 ROBERT SHERMAN BERRY,  
16 Defendant.

2:96-CR-00259-WFN

United States' Sentencing Memorandum

17 The United States of America, by and through the Vanessa R. Waldref United  
18 States Attorney for the Eastern District of Washington, and Joseph H. Harrington,  
19 Assistant United States Attorney, hereby submits its Sentencing Memorandum.  
20

21 **DISCUSSION**

22 On September 2, 2020, following the grant of relief under 28 U.S.C. § 2255, this  
23 Court resentenced the Defendant to, *inter alia*, a five year term of supervised release for  
24 count of conviction 5 (use of a firearm during a bank robbery) and three year terms for  
25 the remaining counts of conviction 1, 2, 4, 6, 8, 9, 10, 11, and 12. *See* Amended  
26 Resentencing JNC, p.4. EFC No. 544. Thereafter, in May, 2021 this Court granted the  
27  
28 United States' Sentencing Memorandum - 1

1 Defendant compassionate release and, as noted in the PSIR, the Defendant commenced  
2 his five-year term of supervision on or about May 14, 2021. *See* PSIR (October 11, 2022)  
3 ¶¶ 12, 232, 301.  
4

5 On June 10, 2022, the Ninth Circuit issued a divided opinion vacating the sentences  
6 imposed on the Defendant at a resentencing and remanding for resentencing. *United*  
7 *States v. Merrell*, 37 F.4<sup>th</sup> 571 (9<sup>th</sup> Cir. 2022). As noted in the decision:  
8

9 Berry was granted compassionate release after this appeal was filed, but is still  
10 subject to supervised release. Because the district court may impose a different  
11 term of supervised release upon the resentencing sought in this appeal, *see* 18  
12 U.S.C. § 3583, Berry’s appeal is not moot. *See United States v. Verdin*, 243 F.3d  
1174, 1178 (9<sup>th</sup> Cir. 2001).

13 *Merrell*, 37 F.4<sup>th</sup> at 573, n.4. The Ninth Circuit expressly stated that the court “of course  
14 express[ed] no opinion as to the appropriate sentences to be imposed on remand.” *Id.* at  
15 578.  
16

17 Section 3583 generally, and the eight sentencing factors identified in Section  
18 3583(e), support a continuation of the Defendant’s five-year term. Here, the Defendant’s  
19 compliant behavior while under supervision thus far is commendable. Such behavior,  
20 however, is expected of a person serving a term of supervised release. It appears that  
21 supervision is working as intended and should be continued to mitigate any future risk of  
22 recidivism by Defendant. Yet, the Defendant is neither employed nor seeking  
23 employment as required by the conditions of his supervised release. *See Amended*  
24 *Resentencing JNC*, p.5 ¶ 7. EFC No. 544. He has reportedly been “inconsistent with his  
25  
26  
27  
28

1 minimal restitution payments of \$25 per month.” PSIR (October 11, 2022) ¶ 13. And,  
2 the other similarly-culpable co-conspirators who remain incarcerated, have been  
3 sentenced to the same term of supervision upon release. Finally, continued supervision  
4 will serve to mitigate any recidivist conduct by the Defendant, the seriousness of which  
5 conduct plainly cannot be understated.  
6

7  
8 The United States respectfully submits that, after considering salient  
9 considerations associated with Section 3583, this Court must conclude that the interests  
10 of justice do not warrant a change in the length of the earlier imposed term. Indeed, given  
11 the significant amount of restitution outstanding, the need to provide restitution to any  
12 victims of the offense weighs against early termination as does unwarranted sentencing  
13 disparities between Defendant and equally culpable co-defendants. In sum, justice would  
14 not be served by shortening the Defendant's current five-year term of supervised release.  
15  
16

### 17 CONCLUSION

18 Based on the foregoing, the United States respectfully submits that this Court  
19 should impose the original five-year term of supervised release on resentencing.  
20  
21

22 Dated this 4th day of November 2022,

23  
24 Vanessa R. Waldref  
25 United States Attorney

26 s/ Joseph H. Harrington,  
27 Joseph H. Harrington  
28 Assistant United States Attorney

**CERTIFICATION**

I hereby certify that on November 4, 2022, I electronically filed the foregoing with the Clerk of the Court and counsel of record using the CM/ECF System.

s/ Joseph H. Harrington,  
Joseph H. Harrington  
Assistant United States Attorney